

WEBINAR WEDNESDAYS



Wednesday, April 1, 2020

ADDRESSING RELEASE CONDITIONS IN A PANDEMIC

Presented by:

Ryan Green

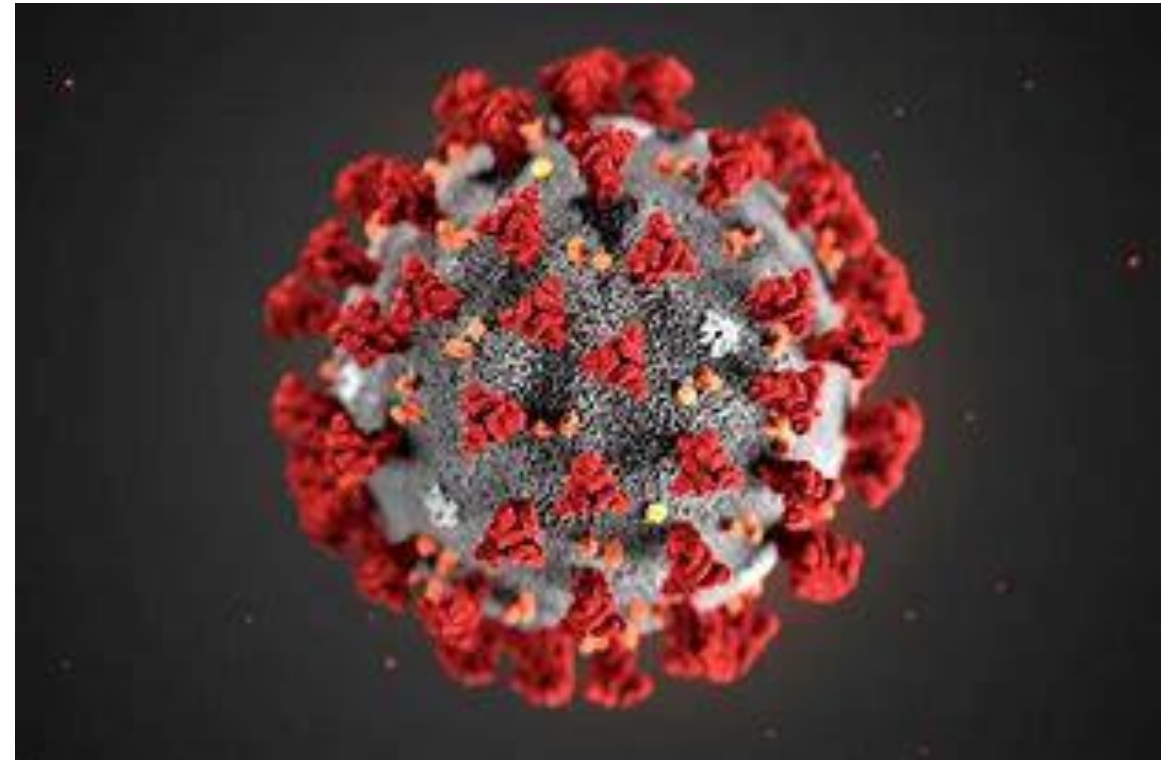
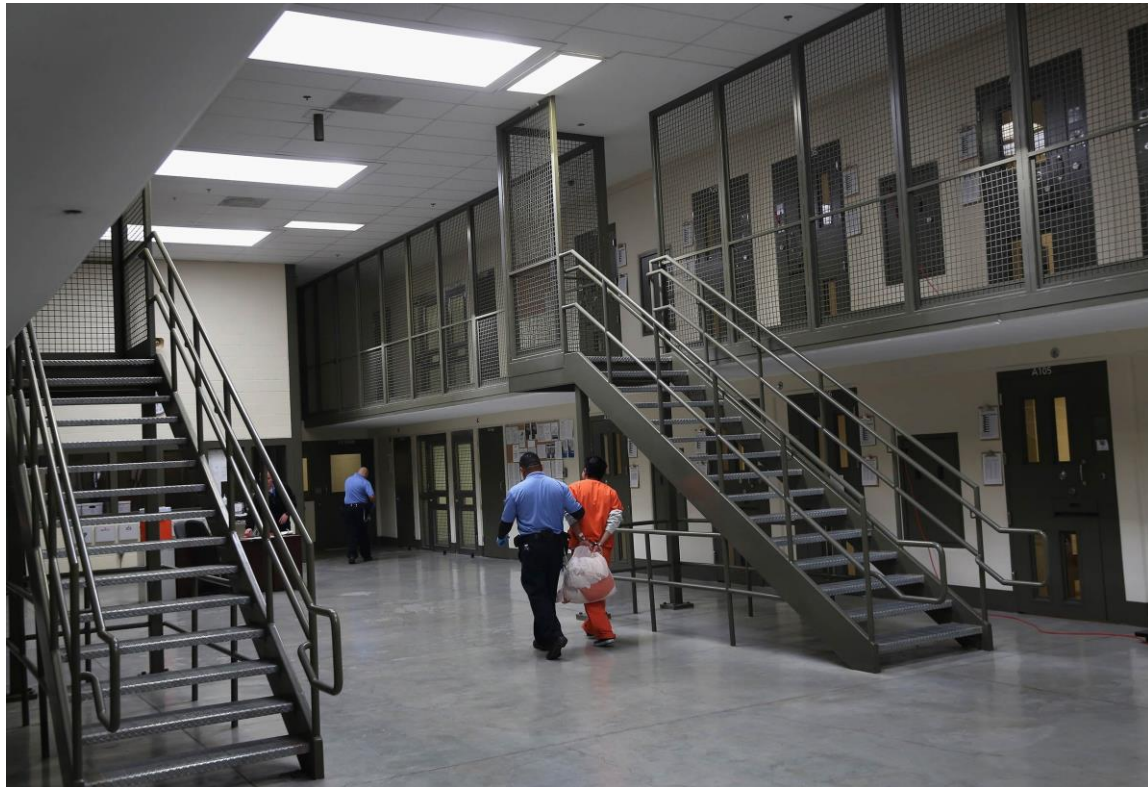
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ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

Addressing Release Conditions in a Pandemic



Goals of the Webinar

- Improve Understanding of the Law Pertaining to Pre-Trial Release
- Help Prosecutors in Arizona Respond Appropriately to Release Motions
 - Balance Public Safety with Health of Inmates
 - Individualized determinations



Epidemics and Pandemics

Epidemic = rapid spread of an infectious disease to a large number of people in a given population within a short period of time

Pandemic = an epidemic occurring over a very wide area, crossing international boundaries

Among the risk factors for the spread of contagious diseases:

Crowded Conditions

Where is your defendant housed?

Unsanitary Conditions

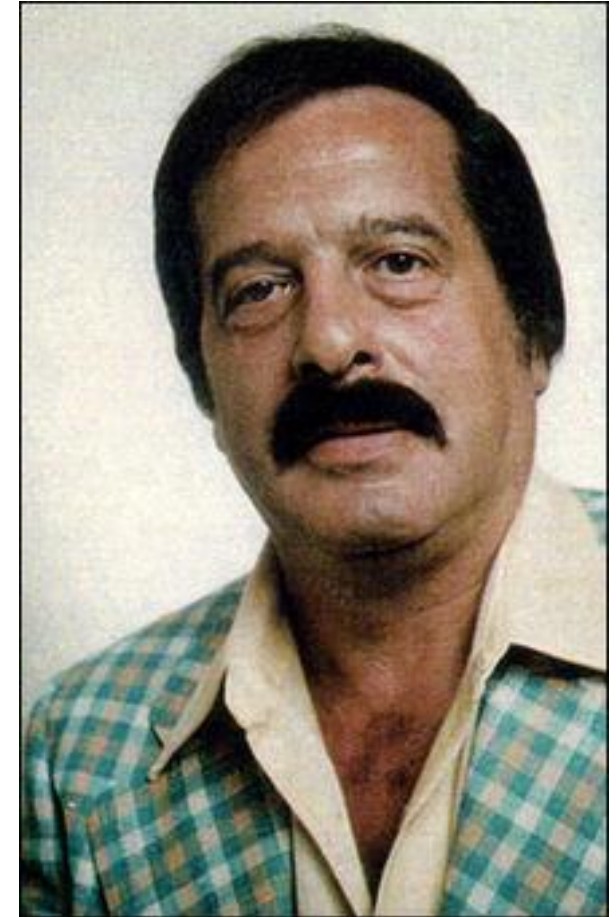
What is your jail doing to prevent the spread?

Other Epidemics and Pandemics

- Typhus bacteria carried by lice
 - Also called camp fever and jail fever
- Malaria parasite carried by mosquitos
- Smallpox virus (now eradicated)
- Tuberculosis bacteria spread by cough and sneeze
- Polio virus epidemic of 1952
- Killed millions in World War I
- 228 million infections in 2018, 405,000 deaths
- Wiped out entire Native American tribes in 1600's
- Estimated to have been the cause of 25% of all deaths in England in 1815.
- Over 57,000 cases, 3,145 died, 21,269 left with some form of paralysis

Outline of Webinar

- **The U.S. Constitution**
 - **8th Amendment's Excessive Bail Clause**
 - **Due Process Clauses**
- **U.S. Supreme Court cases**
 - **Federal statute?**
- **The Arizona Constitution**
- **Arizona statutes**
- **Arizona Rules**
- **International Law**



The “Right to Bail”

Is there an absolute constitutional “right” to bail?

- No.

8th Amendment

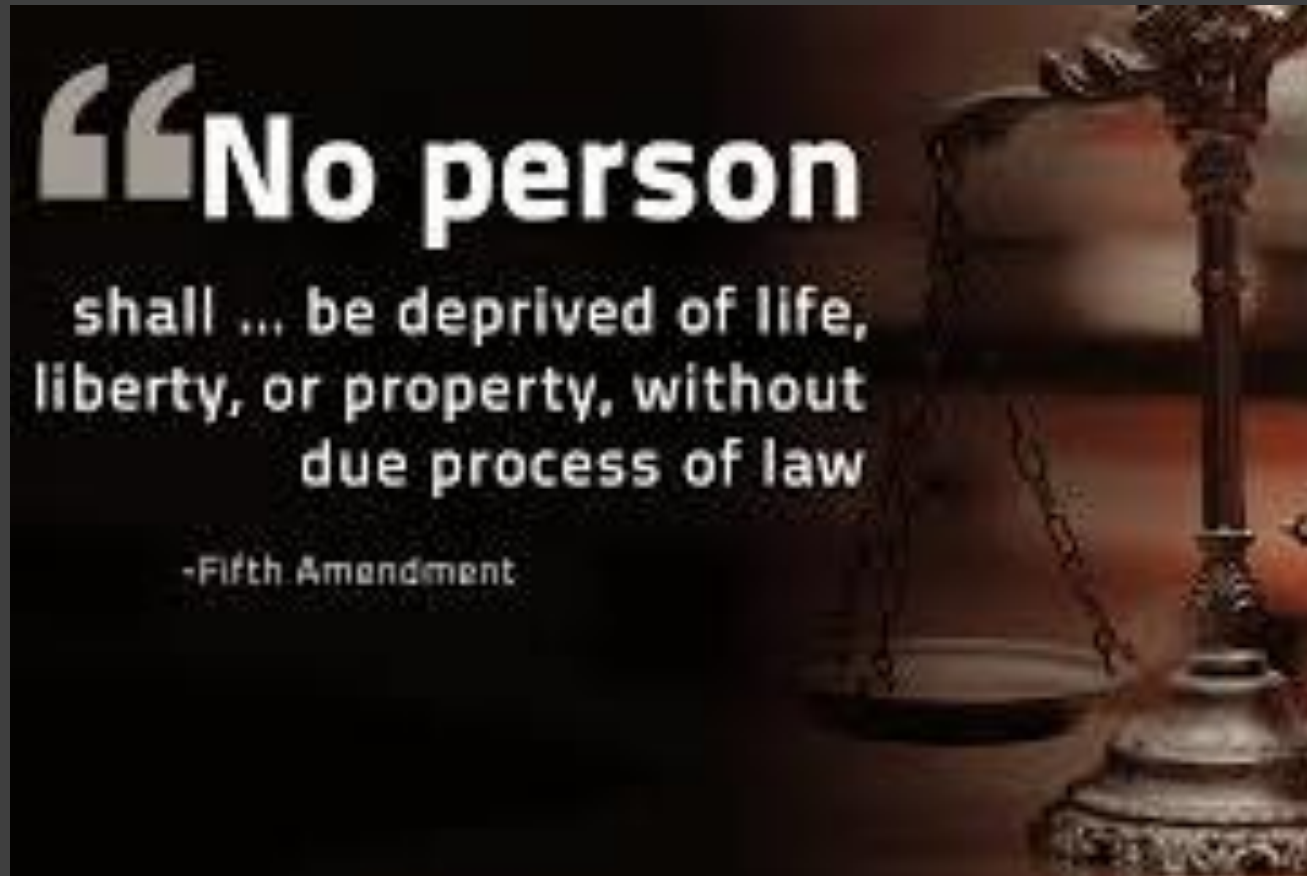
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

“The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.”

Carlson v. Landon, 342 U.S. 524, 545–46 (1952)



Is Pre-Trial Incarceration “Punishment?”



**THE FIFTH AND
FOURTEENTH
AMENDMENTS' DUE
PROCESS CLAUSES**

Bell v. Wolfish

441 U.S. 520
(1979)

- Pre-trial inmates challenged the crowded, double bunking conditions at Metropolitan Correctional Center in NY
- Under Due Process clause, a pretrial detainee must not be “punished” prior to adjudication
- If a particular condition of detention is reasonably related to a government objective, it does not amount to punishment
- It is deemed regulatory, not punitive



Bell v. Wolfish

441 U.S. 520 (1979)

- **WHAT ABOUT THE PRESUMPTION OF INNOCENCE?**
- The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.
- It is “an inaccurate, shorthand description of the right of the accused to ‘remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; ...’



The Bail Reform Acts



BAIL REFORM ACT OF
1966



BAIL REFORM ACT OF
1984

U.S. v. Salerno, 481 U.S. 739 (1987)

- Underboss of the Genovese Crime family in New York
- Nicknamed “Fat” Tony
- Controlled largest “numbers racket” in New York worth 50 million a year
- Suffered a stroke doing a 6-month sentence in 1978
- Suffered a second stroke in 1981
- Indicted in 1985 and 1986 on RICO charges
- 75 years old



U.S. v. Salerno, 481 U.S. 739 (1987)

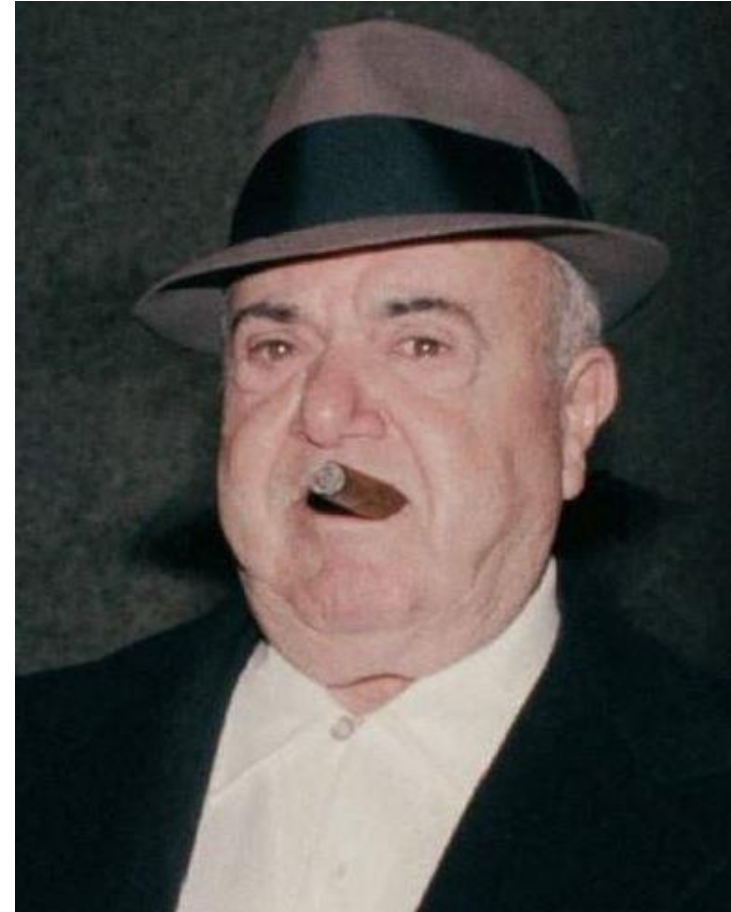
- Under Bail Reform Act of 1984, prosecutor alleged that no condition of release would assure the safety of the community
- At a hearing, prosecutor offered to present two witnesses that Fat Tony was part of two murder conspiracies
- Salerno had a letter from his doctor stating he had a serious medical condition
- District court held him without bond and he challenged the Bail Reform Act



U.S. v. Salerno, 481 U.S. 739 (1987)

5th Amendment and Pretrial Detention

- Pretrial Detention does not constitute “punishment” before conviction but rather regulatory
- Necessary to ensure compliance with legal process
- Bail Reform Act does not violate due process due to arrestee being entitled to a prompt detention hearing



U.S. v. Salerno, 481 U.S. 739 (1987)

8th Amendment Excessive Bail Clause

- Salerno argued that the Bail Reform Act was unconstitutional because the Bail Clause only allowed the court to consider the risk of “flight”
- “While we agree that a primary function of bail is to safeguard the courts' role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.”
- A court can outright deny bail in limited exceptions such as one charged with a serious crime and where **“no conditions of release can reasonably assure the safety of the community or any person.”**
- This language generally requires an individualized determination of dangerousness or flight to deny bail

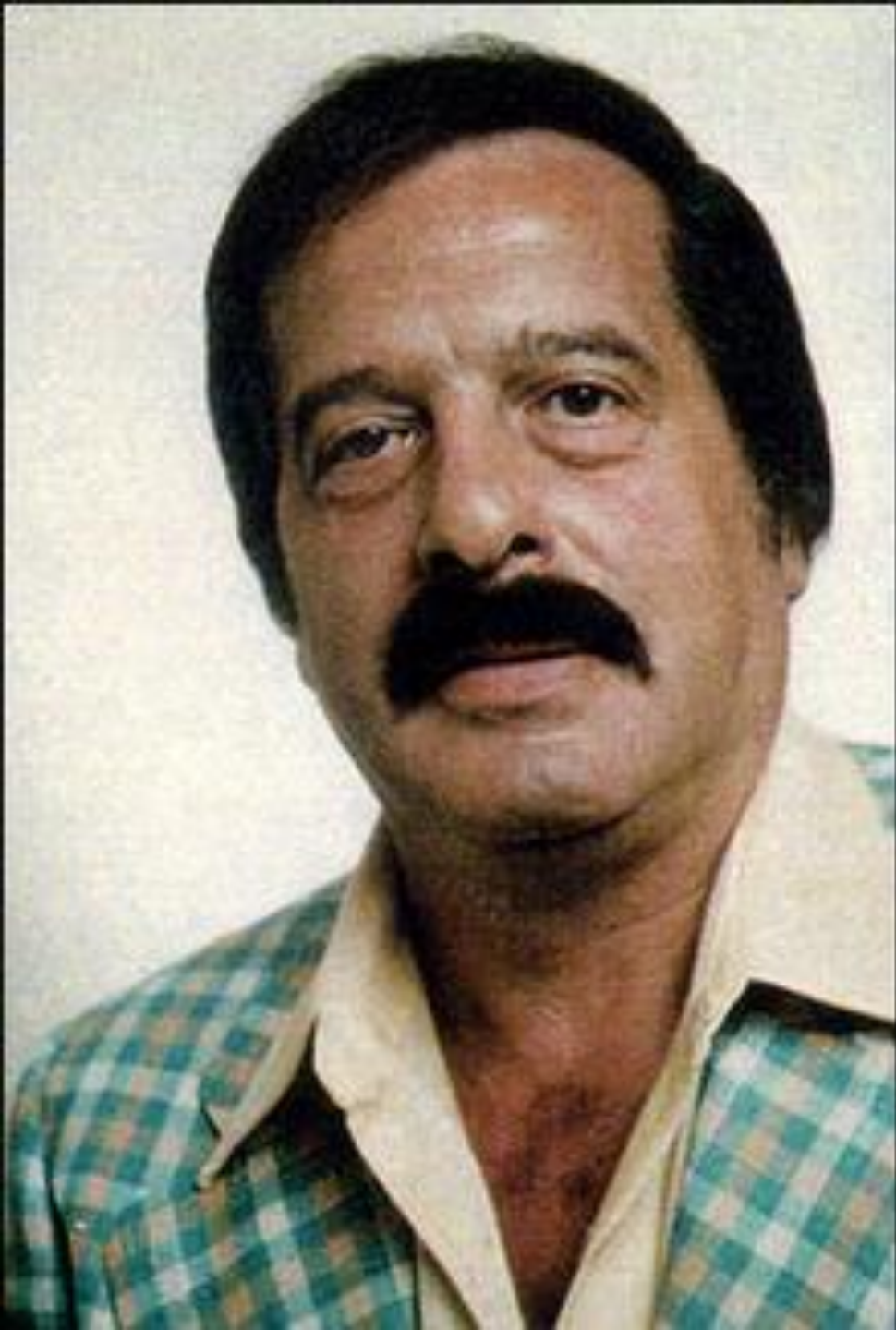




U.S. v. Gregory Scarpa, 815 F.Supp. 88 (1993)

- Nicknamed “The Grim Reaper”
- Hitman for the Colombo crime family
- Suspected of a minimum of 80 murders
- Yet, the FBI used him as an informant????
- Surgery for bleeding Ulcer in 1986, contracted HIV
- In 1992, charged with RICO charges involving 3 murders
- While on house arrest involved in a shootout shootings and lost an eye
- House arrest was revoked

This case is cited in a template used by defense attorneys nationwide



U.S. v. Gregory Scarpa, 815 F.Supp. 88 (1993)

- Life expectancy “only a month or two”
- Lost 25 pounds since entering MCC from “AIDS Wasting”
- No stomach
- No left eye
- AIDS related dementia

Even then he was not just “released,” but rather:

- To a hospital
- Under 24 hour guard by US Marshal’s Service
- At his family’s cost

EX-LIB

THE PROPOSED
CONSTITUTION FOR THE STATE OF ARIZONA

Adopted by the Constitutional Convention, held at
Phoenix, Arizona, from October 10
to December 9, 1910.

PREAMBLE.

We, the people of the State of Arizona, grateful to Almighty
God for our liberties, do ordain this Constitution.

ARTICLE I.

STATE BOUNDARIES.

The boundaries of the State of Arizona shall be as follows,
namely: Beginning at a point on the Colorado River twenty
English miles below the junction of the Gila and Colorado Rivers,
as fixed by the Gadsden Treaty between the United States and
Mexico, being in latitude thirty-two degrees, twenty-nine minutes,
forty-four and forty-five one-hundredths seconds north, and longi-
tude one hundred and fourteen degrees, forty-eight minutes, forty-
four and fifty-three one-hundredths seconds west of Greenwich;
thence along and with the international boundary line between the
United States and Mexico in a southeastern direction to Monu-
ment Number 127 on said boundary line, in latitude thirty-one
degrees, twenty minutes north; thence east along and with said
parallel of latitude, continuing on said boundary line to an inter-
section with the meridian of longitude one hundred nine degrees,
two minutes, fifty-nine and twenty-five one-hundredths seconds
west, being identical with the southwestern corner of New Mexico;
thence north along and with said meridian of longitude and the
west boundary of New Mexico to an intersection with the parallel
of latitude thirty-seven degrees north, being the common corner
of Colorado, Utah, Arizona, and New Mexico; thence west along
and with said parallel of latitude and the south boundary of Utah
to an intersection with the meridian of longitude one hundred
fourteen degrees, two minutes, fifty-nine and twenty-five one-hun-
dredths seconds west, being on the east boundary line of the State
of Nevada; thence south along and with said meridian of longitude
and the east boundary of said State of Nevada, to the center of
the Colorado River; thence down the mid-channel of said Colorado
River in a southern direction along and with the east boundaries of
Nevada, California, and the Mexican Territory of Lower Califor-
nia, successively, to the place of beginning.

Arizona Constitution

Article II, Section 22

B. The purposes of bail and any conditions of release that are set by a judicial officer include:

1. Assuring the appearance of the accused.
2. Protecting against the intimidation of witnesses.
3. Protecting the safety of the victim, any other person or the community

EX-113

James N. Sharpe m218 22532

March 4, 1912.

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Nevada, California, and the Mexican Territory of Lower Califor-
nia, successively, to the place of beginning.

Arizona Constitution

Article II, Section 22

A. All persons charged with crime shall be bailable by sufficient sureties, except:

1. For capital offenses, ~~sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age~~ when the proof is evident or the presumption great.
2. For felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge.
3. For felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge.
4. ~~For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.~~

A.R.S. 13-3961 to 3974 (Our Bail Statutes)



- §13-3961 (use when trying to hold without bail)
- §13-3967 (This is the most important provision)

A.R.S. 13-3967



- Section A: Any Person ...bailable as a matter of right shall be ordered released pending trial on his own recognizance or on the execution of bail...
- Importance: The law begins with a presumption in favor of release

What Must the Judge Consider under §3967

Some of The Most Important Factors

1. The views of the victim
2. The nature and circumstances of the offense charged
3. Prior arrest or conviction for a serious or violent or aggravated felony
4. Evidence that the accused poses a danger to others
5. Lethality assessment in DV case
6. The weight of the evidence
7. Family ties, employment, financial resources, character and mental condition
8. Results of drug tests
11. Length of residence in the community
12. Record of arrests and convictions
13. Failures to Appear

What Information Can I Offer under §3967?

- Any information that is stated or offered in connection with any order pursuant to this section need not conform to the rules pertaining to admissibility of evidence in a court of law.

[Section H of 13-3967]

What Conditions Can I ask For under §3967?

After providing notice to the victim pursuant to § 13-4406, a judicial officer may impose any of the following conditions on a person who is released on his own recognizance or on bail:

1. Place the person in the custody of a designated person or organization agreeing to supervise him.
2. Place restrictions on the person's travel, associates or place of abode during the period of release.
3. Require the deposit with the clerk of the court of cash or other security, such deposit to be returned on the performance of the conditions of release.
4. Prohibit the person from possessing any deadly weapon or engaging in certain described activities or indulging in intoxicating liquors or certain drugs.
5. Require the person to report regularly to and remain under the supervision of an officer of the court.
6. Impose any other conditions deemed reasonably necessary to assure appearance as required including a condition requiring that the person return to custody after specified hours.

[Section D of §3967]

Is There a Law For Disease in the Jail?

When a pestilence or contagious disease occurs in or near a jail and the physician in attendance certifies that it is liable to endanger the health of the prisoners, the judge of the superior court may, by an order in writing, designate a safe and convenient place in the county, or the jail in a contiguous county, **as the place of confinement**. The order shall be filed in the office of the clerk of the superior court, and the sheriff shall thereupon remove the prisoners to the place or jail designated, and there confine them until they can be safely returned to the jail from which they were taken.

Ariz. Rev. Stat. Ann. § 31-106



Is There a Law For Emergency Threats To the Jail?

When a county jail or building contiguous to it is **on fire** and there is reason to apprehend that the prisoners may be injured or endangered, the sheriff shall remove them to a safe and convenient place **and there confine them as long as necessary.**

Ariz. Rev. Stat. Ann. § 31-107



A.R.S. § 31-233 (B) (Temporary Removal of a Prison Inmate)

B. Under specific rules established by the director for the selection of inmates, the director may also authorize furlough, temporary removal or temporary release of any inmate for compassionate leave, for the purpose of furnishing to the inmate medical treatment not available at the prison or institution, for purposes preparatory to a return to the community within ninety days of the inmate's release date or for disaster aid, including local mutual aid and state emergencies. When an inmate is temporarily removed or temporarily released for a purpose preparatory to return to the community or for compassionate leave, the director may require the inmate to reimburse the state, in whole or part, for expenses incurred by the state in connection with the inmate's temporary removal or release.

Note the language “medical treatment not available at the prison or institution”

Also Note: the release for “state emergencies” is related to providing aid to communities (flood, fire, etc.)

A.R.S. 41-1604.11 (Temporary Removal of a Prison Inmate)

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Note the language “medical treatment not available at the prison or institution”

Also Note: the release for “state emergencies” is related to providing aid to communities (flood, fire, etc.)

Thoughts About Those Statutes

- The statutes do not apply to inmates in the county jail;
- They apply to prisoners in the State Department of Corrections.
- Neither of those statutes allow for a healthy inmate to be released due to the mere possibility of being infected.
- The statutes only allow for compassionate leave when the inmate needs “medical treatment not available at the prison or institution.”
- Be sure to ask the questions:
 - Has the defendant been diagnosed with COVID-19?
 - Is treatment for the virus “not available within the institution.”



Rule 7, Arizona Rules of Criminal Procedure

- If the offense is bailable as a matter of right, the starting point is release on the defendant's own recognizance. See Rule 7.2(a)(2)
- The Rule directs the judge to A.R.S. §13-3967(B)
- Is there any reference to a defendant's health in Rule 7?
- Answer: Yes, but only applies post-conviction
- Rule 7.2(c)(1)(B) states:

If a defendant is convicted of a felony offense and is sentenced to prison, the court may not release the defendant... **unless the court finds the defendant is in such a physical condition that continued confinement would endanger the defendant's life."**





For Low Risk,
Vulnerable Inmates...



- You may want to review the list of alternative conditions to release set forth in Rule. 7.3 and offered by your pretrial services agency
- The Court can fashion a solution to the particular case under Rule 7.3 (c)(1)(G) (*“imposing any other non-monetary condition that is reasonably related to securing the defendant’s appearance or protecting others or the community...”*)

Should the COVID-19 Motion be Heard?

- Rule 7.4(c)(1) states:

On motion or on its own, a court may reexamine bail eligibility or the conditions of release if the case is transferred to a different court or a motion alleges **the existence of material facts not previously presented to the court.**

COVID-19, State of Emergency, etc. = material fact

- The pandemic is just one factor that courts should consider when determining appropriate release conditions
- But in conjunction with statutory factors

Victims' Bill of Rights

- Article II, Section 2.1
 - 2) To be informed, upon request, when the accused or convicted person is **released** from custody
 - 4) To be heard at any proceeding involving a **post-arrest release decision**, a negotiated plea, and sentencing

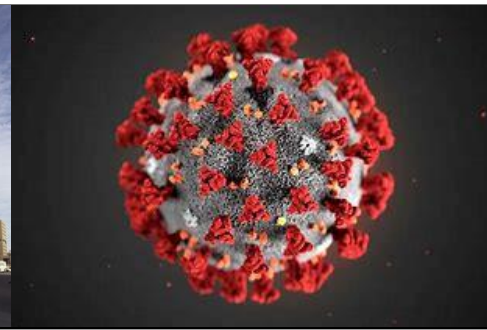




International Covenant on Civil and Political Rights (ICCPR)

- The ICCPR does not create judicially-enforceable rights, is not self-executing, and not been given effect by congressional legislation. *U.S. v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002)
- ICCPR is not binding on courts of the United States. *See Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001)

Don't Forget:



- The COVID-19 pandemic does not justify release conditions that violate the Arizona Constitution, statutes, or jeopardize public safety
- Assess MMRC based on the specific facts and circumstances of the case, consistent with the law and in light of the COVID-19 pandemic
- There is no one-size-fits-all answer - each case should be considered on its own
 - Based on the individual facts and circumstances of a case/individual you may determine holding that person in custody is appropriate despite the current pandemic